

Please attach the following **one-page summary** to your submission.

Comments on the Interim Report for the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*

Summary

Name of author/organisation:

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Date:

3 August, 2009

Which chapter(s) of the interim report are you commenting on?

(e.g. Chapter 11: Heritage)

2 Role of the Commonwealth

3&4 - EIA

10 - Landscape scale assessment

Key points of submission

(please identify up to three main priorities or focal points of your submission):

The submission presents Magnetic Island as a case study of an area immersed in MNES which is under the control of a local government authority, and then addresses selected issues in the Interim Report as they relate to the Magnetic Island Case.

MNES have not been adequately protected on Magnetic Island due to failures of local and state government processes, and the EPBC Act.

The submission discusses selected paragraphs in the Interim Report as they may redress current failures on Magnetic Island.

References (if possible, include a bibliography of any documents you may wish to make available)

MICDA 2004. *A Preliminary Assessment of the World Heritage Values of Magnetic Island*

Kenchington and Hegerl 2005. *World Heritage Attributes and Values Identified for Magnetic Island and the Surrounding Marine Environment*.

Draft EPBC Act Policy Statement 5.1: Region - Magnetic Island

MICDA submission to *Draft EPBC Act Policy Statement 5.1: Region - Magnetic Island*

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No

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Submission by the Magnetic Island Community Development Association (MICDA)
In response to
the Interim Report of the Independent Review of the EPBC Act (1999)
(The Interim Report)
3 August, 2009.

This submission primarily addresses the failure of the EPBC Act, and especially the project-by-project assessment of referrals, to avoid significant cumulative damage and prevent adverse impacts of MNES. It also addresses the Interim Report's discussion and proposals for a paradigm shift to landscape-scale holistic approaches that harmonise the EPBC objects with relevant local and state legislation.

In consideration of these issues, MICDA offers Magnetic Island as a case study to illustrate the current deficiencies and possible solutions. This submission is structured in two parts. Part one presents Magnetic Island, its MNES, and the current failure of the EPBC Act and relevant State and Local Government instruments in protecting those MNES. The second part considers selected sections of the Interim Report that are relevant to the current failures in Magnetic Island's regulatory framework, and most importantly, potential solutions.

PART ONE – MAGNETIC ISLAND THE CASE STUDY

Background

Magnetic Island is a generic example of an urban area, under the control of a local government authority, within a World Heritage Area (and therefore abounding in MNES).

Magnetic Island is more than just a suburb, albeit a particularly beautiful suburb, within the jurisdiction of Townsville City Council. Magnetic Island lies within the Great Barrier Reef World Heritage Area (GBRWHA), and the Great Barrier Reef National Heritage Area (GBRMHA), and it is home to several listed species and ecological communities, migratory species, and even some endemics. While it is one of around 600 continental islands in the GBRWHA, it is the only island located in the Northern Brigalow Belt Region of North Queensland, and it is the only high Dry Tropics continental island within the GBRWHA. This means that there are natural values which contribute to the World Heritage values of the GBRWHA, that are uniquely expressed on Magnetic island and occur nowhere else in the entire world heritage area. There is also a small amount of Commonwealth land on Magnetic Island. **Thus – Magnetic Island is richly endowed with matters of NES.**

Besides being an important tourist holiday destination, Magnetic Island is also home to a significant permanent residential population measured at the 2006 census as 2108 people. That census also reported that one in three residences were unoccupied on census night, which is roughly consistent with MICDA's register of total available tourist accommodation (ie, when completely full such as during Easter and Christmas) at 5000 tourist beds. Thus, when all tourist accommodation is full, the total population of Magnetic Island swells to over 7000. The island is also subject to significant development speculation and continual development applications. MICDA's registers currently estimates a further 2000 'latent' tourist beds which are either approved but not built, or built but not sold. A recent seminar by the Queensland Department of Infrastructure and Planning projected that the permanent residential population of Magnetic Island will increase by 61% between 2006 and 2016. Thus – development pressure on Magnetic Island is likely to increase. By way of illustration of this point, see figures 1a) and b) which depict an aerial photo of Horseshoe Bay (a bay with extensive

lowlands) superimposed with the cadastre in 2004 and again in 2007 including all subdivisions approved in the meantime.

There is an urgent need to ensure that development control decision are taken within the context of protection of MNES.

Figure 1: a)

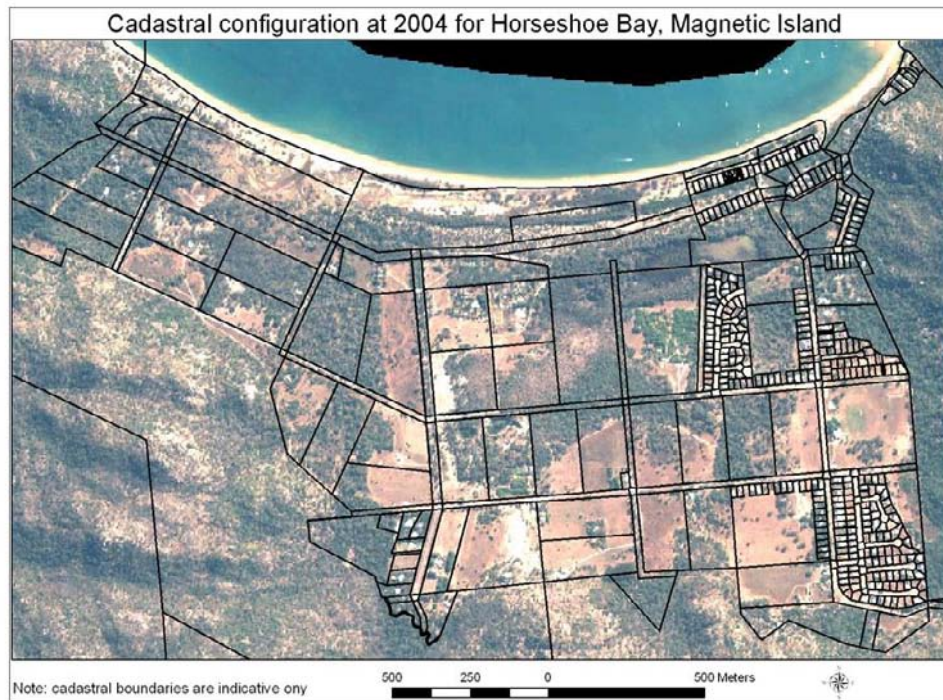
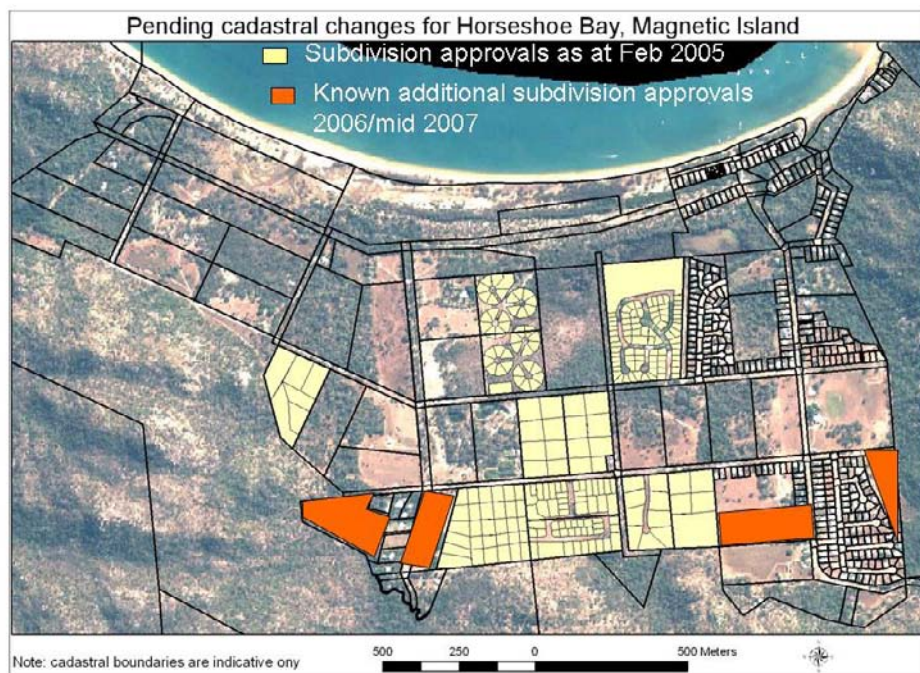


Figure 1: b)



It took a number of years and many representations (including many by MICDA), before State and local Government acknowledged and recognized that Magnetic Island is part of the Great Barrier Reef World Heritage Area (GBRWHA) and not simply surrounded by it. MICDA also mounted a campaign to document the place-based values of Magnetic Island which contribute to the GBRWHA, in order to support better decision making. With the Magnetic Island Nature Care Association, in 2004 MICDA commissioned regional scientists to compile the report *A Preliminary Assessment of the World Heritage Values of Magnetic Island*, and disseminated it to all three levels of government. The conclusions of this report are consistent with a subsequent independent consultant report commissioned in 2005 by the Australian Department of Environment, Water Heritage and the Arts (DEWHA), *World Heritage Attributes and Values Identified for Magnetic Island and the Surrounding Marine Environment*, by Richard Kenchington & Eddie Hegerl. This report identified 24 World Heritage values on Magnetic Island, of which 10 (40%) were assessed as a value uniquely expressed on Magnetic Island (ie, expressed only on Magnetic Island and nowhere else in the WHA).

A unique feature of Magnetic Island, compared to other continental islands in the GBRWHA, is the existence of extensive lowland landscapes and habitats. The lowlands give rise to many of the island's unique contributions to the values of the GBRWHA. While approximately half of this large continental island (2533ha) is protected as a National Park, this protection is almost completely restricted to the elevated country. Ironically, the unique and important lowland habitats (and areas containing uniquely expressed values) are almost completely outside the boundaries of the protected estate and subject to urbanisation and development pressure.

Magnetic Island, given both its proximity to Townsville and accessibility, makes a major contribution to the World Heritage Values of the Great Barrier Reef WHA (and Australia's international WH obligations) as it provides a unique opportunity for presentation of those values (also part of Australia's international obligations under the World Heritage convention).

Failure of State and Local Governments:

Given the reluctance of state and local government to acknowledge Magnetic Island's world heritage status, it is hardly surprising that protection of MNES such as world heritage values has not been central to the state and local government legal and planning instruments, which have controlled development and other activities in the lowlands of the island.

For example, while retention of remnant vegetation in the lowlands is obviously critical for the maintenance of key lowland natural values (by maintaining associated habitats), there is absolutely no proactive regulation of vegetation clearing in Magnetic Island's lowlands, at either state or local government level. The island falls outside the scope of Queensland's Vegetation Management Act because it is an urban area. Townsville City Council processes are impotent to control vegetation clearing, until AFTER a development approval has been granted (when vegetation control may be imposed as a condition of approval). Thus, the status quo for most developers is to clear their blocks prior to applying for development approval. To put this into perspective, consider the potential for pre-emptive clearing in figures 1 a) and b). A similar scenario can be described in catchment function management, despite its importance to maintenance of lowland ecosystems (which form important refugia for wildlife from the highlands during extended dry season). Stormwater treatment and management of watercourses on the island falls outside the scope of Queensland's Water Act, and is treated by Townsville City Council as primarily a drainage/engineering issue. MICDA can provide more specific data and other case study examples of 'gaps' in local and state government regulatory frameworks leading to systematic and cumulative significant adverse impacts on MNES.

At best, the plans and policies produced at state and local government level and relevant to Magnetic Island, have included worthy motherhood statements about protection of the natural values of Magnetic Island. Unfortunately, these plans and policies allow enormous subjective discretion as to how they are implemented, resulting in many actions going ahead that are not consistent with the environmental objectives of the plans and policies themselves. Cityplans under Queensland's Integrated Planning Act provide very little certainty for anyone, as every development application is 'code assessed' on a case by case basis, which further exemplifies the fragmentation of decision making and potential for cumulative impacts on MNES.

At the most fundamental level, local and state government plans and policies for Magnetic Island do not even pretend to be aligned to the objects of the EPBC Act, and the relevant agencies will readily admit that this is not their job – rather, it is the job of DEWHA and the EPBC Act itself to regulate the protection of MNES such as world heritage values. These agencies rely on project-by-project referrals to DEWHA to capture and consider protection of MNES.

Failure of the EPBC Act

The EPBC Act has also failed to capture proposed actions that fall-through gaps exposed by the local/state frameworks, for two main reasons: 1. the problem of scale in the project by project approach to referrals and the reality of cumulative impacts being essentially unregulated; and 2. a lack of capacity in the decision making process including rigorous and comprehensive place-based information about what the MNES are.

The issue of scale and EPBC's inability to take cumulative damage into account has generated much discussion in the Interim Report which is relevant to the case of Magnetic Island. Application of the EPBC Act has demonstrated that for a proposed action to become a controlled action it has to be so 'big and bad' that, by and of itself, it will create an adverse impact on one or more MNES. In an environment like Magnetic Island, where the scale of referrals is rarely sufficient to meet this test, the well-clichéd 'death by 1000 cuts' is a very sad and well demonstrated reality. While MNES by definition are big-picture items – they are actually the sum of parts which occur individually at a smaller scale, and should be managed collectively and holistically (rather than part-by-part).

The second issue of insufficient capacity for diligent decision making, has many facets. One is a lack of place-based information about the location of values and their requisite habitats and landscapes. For example, one action referred to the minister, to clear and fill 11 acres of remnant lowland and wetland habitat in Nelly Bay on Magnetic Island, failed to be declared a controlled action. This problem has largely been remedied through the publication of the two reports mentioned above, plus extensive regional ecosystem mapping now available through the Queensland EPA. The referral described above, which represents the last major tract of intact lowland forest in Nelly Bay which is contiguous with the National Park highlands, would have certainly triggered the act if it was referred now that this comprehensive information is available. This raises an issue not extensively discussed in the Interim Report – that of latent damage potential, and the possible need for re-assessment of referrals once new information comes to light.

Another facet in capacity of DEWHA relates to resourcing. Without wishing to cast dispersions on the capacity of individual officers of that department (which in our experience have done nothing but their best within the constraints of workloads), there is no doubt that inadequately resources for best-practice and diligent assessments is a reality. This issue has been raised in the Interim Report, and is further illustrated with the following example of DEWHA's attempt to develop a Policy Statement for Magnetic Island.

Since the EPBC came into force in July 2000 MICDA has made numerous representations seeking better and more holistic protection under the Act for MNES on Magnetic Island. As outlined earlier in this submission, a report was prepared in 2004 to get the ball rolling with respect to certain MNES (those relating to World Heritage Values). The outcome of this effort was that, in 2005, DEWHA commissioned an independent report on the island's world heritage values (described above), and advised MICDA that Magnetic Island was one of four priority areas in Australia for which locational EPBC policy was to be developed, and that this policy initiative would address our concerns. Unfortunately, and despite our unfailingly strong support for the process, there were repeated and extensive delays in the policy development process. A first draft of *EPBC Act Policy Statement 5.1: Region - Magnetic Island* was finally released for public consultation in September 2008 (after 2 and a half years!). [It is interesting that in the meantime, other solutions were found for the other three 'priority areas', so when completed, the locational policy for Magnetic Island will be the only such policy under the Act]. In our November 2008 consultation in Townsville with DEWHA officers it was agreed that the draft was completely inadequate: it did not include World Heritage information from the Kenchington-Hegerl report, nor the readily available EPA regional ecosystem mapping. In effect it maintained and validated the status quo, did not use available data which would locate MNES on Magnetic Island, and required implementation through local government planning instruments (known to be impotent for the purpose). Over almost 4 years and many, many transient DEWHA officers later, we are still waiting for a policy statement for Magnetic Island.

PART TWO – SELECTED COMMENTS ON THE INTERIM REPORT

Chapter 2 - Commonwealth role and EPBC objectives

We applaud the existence of a 'Heads of Agreement' between Australian Governments, (para 2.29) which aims for protection of the environment secured through a 'cooperative approach' in a spirit of cooperative federalism'. The Interim Report also expresses concern (para 2.30) that any extension of Commonwealth's powers (in regulation of environmental matters) may be seen as a renegotiation of the heads of agreement.

MICDA's view is that the Heads of Agreement as it stands is perfectly adequate in setting the scene for all levels of government working together – the problem is that this is not happening! MICDA agrees with paragraph 2.106 – collaboration across all levels of government has not been as effective as it should be. The Commonwealth's assumption, that state and local government agencies would 'pick up the slack' on small scale cumulative impacts (see 4.227) has not eventuated. There is a clear need for better harmonisation of environmental objectives across all levels of government.

Para 2.71 raises a key question – given that many projects and actions covered by EPBC are also covered by state and territory laws – how can a Commonwealth system add value to those? The experience of Magnetic Island suggests that currently, the State and Local instruments and agencies do not see a need for alignment with the EPBC – rather they see their job as quite separate to it. MICDA supports further efforts to better align environmental objectives of all three levels of government to the objects of the EPBC Act, and provision of a role for the Commonwealth to oversee outcomes and provide a safety net to catch proposed actions that fall through gaps in State and Local frameworks, and 'call in' actions that put MNES at risk.

MICDA supports the proposal outlined in para 2.80, that the objects of the act be amended to reflect the paradigm adopted in Canadian federal environment law (outlined in paras 2.78 and 2.79). MICDA supports this holistic approach, and the inclusion of remedial measures (the potential to rehabilitate damaged landscapes) in addition to preventative protective measures. This model seems to effectively promote all levels of Government working together, and the inclusion of public participation.

MICDA supports both roles proposed for the Commonwealth in EIA, presented in para 2.112 – that of ‘standard setter’ and that of ‘decision maker of last resort’. If state and/or local government laws are unable and fail to protect MNES, as has occurred on Magnetic Island, then the Commonwealth should have the power to step in.

Regarding potential role of EPBC on decision making in land-use, MICDA view is that

- failures on MI are because MNES are not adequately integrated into state and local laws – which actually control decision making
- EPBC has not been invoked often enough, partly because decision making scale is too small (without consideration of cumulative impacts) and partly because insufficient place-based information on the MNES has been available to EPBC decision makers in Canberra.
- This has resulted in great uncertainty for all.
- MICDA supports an EPBC role in requiring and approving/endorsing planning instruments that holistically will protect MNES.

MICDA supports the suggestion outlined in 2.116 that the Minister have regard to State and local planning and environment legislation and policies/schemes, but this should only be relevant if these schemes support the objects of and are consistent with the Act. One way to ensure this and at the same time create the certainty craved by all stakeholders, especially in areas where there are many MNES combined with very active local government activities and development pressures (such as Magnetic Island and other residential/urban areas within a WHA) is to create a process of EPBC endorsement of these state and local government planning and environmental management instruments (such as discussed later in Chapter 10 comments). Harmonisation is important – but when it comes to protection of MNES, the buck stops with the Commonwealth and the EPBC Act, as described in para 2.120.

MICDA also supports the proposal in para 2.123, that the Minister have an ‘oversight’ role for projects that are approved at State level, possibly through accreditation of State (and local) processes. We also endorse the suggestion in 2.126 that the performance of harmonisation between the Commonwealth and the State/local processes should be regularly evaluated and reviewed. This is particularly important as EPBC objects are unlikely to be priority number one in all instruments that may be relied on to deliver protection of MNES through such a harmonised accredited system. For example, a local government cityplan will have a number of competing objectives in the political, social and economic arenas. There is therefore a strong need for the EPBC to continue with an oversight role, when it comes to protection of MNES.

MICDA supports the potential complementarity of harmonising the environmental objectives of all three levels of government – not just for the protection of MNES, but also wider environmental issues that while not MNES may be important at a local scale (as described in para 1.127). We also agree, based on the Magnetic Island experience outlined in Part one of this submission, that officers of DEWHA based in Canberra may not always have access to adequate place-based information. However, while we agree that in principal more local authorities should have access to better information, our experience is that they will lack the

political incentive to use that information to protect MNES in their decision making, unless their processes and legal instruments are aligned with EPBC objectives.

Chapter 3 – Scope of EIA under the EPBC Act and Chapter 4 – EIA

As outlined above, MICDA supports the notion that the Commonwealth should have an oversight, standard setting role in ensuring that State and Local Government planning, policy development, and approval decisions are aligned with the objects of the EPBC Act. The actual mechanism by which this could occur requires further careful consideration, and MICDA applauds the review team for their identification of several options for amendments to the Act.

Para 3.51 suggests the inclusion of national-level policies and planning as a new MNES (which would require that any local land-use plans would need approval under the Act). MICDA agrees with the Interim Report's concerns with this approach (3.52 and 3.53) and the potential for significant duplication of assessment effort. In the current environment of inadequate resources, this approach could well spread available resources so thinly as to reduce protection of MNES, rather than enhance protection. However, we do not agree with the suggestion in paragraph 3.53, that state and local agencies should be encouraged to more plans for strategic assessment under the act, due to the lack of political will to align with EPBC (as we have seen on Magnetic Island). MICDA would instead favour an amendment which gave the Minister the power to require strategic assessment of packages of selected local and state plans, policies, and laws where they are to be implemented in areas with a high incidence of MNES.

In further support of amendments that establish a system of non-voluntary EPBC scrutiny of relevant state and local government plans and policies, MICDA is sympathetic to the suggestion that the definition of 'action' in the act be expanded to include local government land-use land-use plans, policy development, and development approvals (para 3.58 and 3.64-66; and 4.24-25). This could administratively streamline assessment of such planning instruments into the normal referral process. However, MICDA believes that a diligent landscape-scale strategic assessment process is more appropriate for such planning instruments.

MICDA is intimately familiar with several referral documents that relate to proposed actions on Magnetic Island, and concurs with the expressed concern over the sometimes poor quality of information in referrals, including the provision of inaccurate information by proponents. This situation is perhaps exacerbated by being a system of self-referral, and inadequate resources and capacity (including access to adequate independent place-based detailed information) within DEWHA. We agree that this problem may be redressed by suggested amendments to the act which would establish standards of information, and/or accreditation of people preparing or certifying the information. (paras 4.50, 4.79). However, the fundamental issue of the enormity of the task of protecting MNES, and department resourcing must also be addressed. The Secretary of the Department has stated (para 4.79) that external consultants are engaged when the Department lacks the necessary expertise – but in practice there is a process of prioritisation of finite resources, and it is unlikely that all deserving issues would benefit from such investment. The reality is that MNES are dispersed across Australia which is a big place – and Canberra is a long way from most of it!

This point leads again to the possibility of involving more local authorities within State or Local government, in the EIA process. It is reasonable to expect that these agencies might have more place-based knowledge and expertise about the MNES. However, as outlined earlier (and again in comments on Chapter 10 below), this would only be effective (with respect to the EPBC objects) if the relevant local and state instruments were aligned with EPBC with all

necessary rigor and diligence. MICDA concurs with concerns raised in the Interim Report that without adequate resourcing for the required diligence, bilateral agreements risk implementing a ‘lowest common denominator’ of environmental protection. MICDA certainly does not agree to any amendment which would result in a less onerous or rigorous EIA than the current EPBC standard.

MICDA also agrees with, and has experienced first hand, the problem of lack of awareness about EPBC and MNES issues at the local government level (paras 4.164-166). As noted above, MICDA has to work hard to convince Townsville City Council that the lowlands of Magnetic Island (under their control) contained important MNES. MICDA supports the identified need for greater awareness raising in local government authorities, where they preside over development applications in areas of MNES. The suggested non-voluntary strategic assessment of local land-use planning instruments (in areas of MNES) would certainly provide important incentive for this.

Cumulative Impacts

MICDA completely agrees with the Interim Report’s analysis of the EPBC Act’s inability to accommodate cumulative damage to MNES— primarily due to the exclusion of cumulative damage from the referral assessment process and the test of significance (paras 4.225-227). While cumulative impacts can be considered in the approval decision (once an action is a ‘controlled action’ – para 4.230), many referrals (with cumulative impact potential) never get to that stage. Thus – in the case of Magnetic Island – the ‘death by 1000 cuts’ is a sad reality in the important lowland habitats, where widespread incremental clearing of remnant vegetation has occurred. Inability of the EPBC Act to capture control of incremental damage, combined with failure of State and local government processes to prioritise protection of MNES, has resulted in substantial adverse and significant impacts on MNES.

It is small comfort that such an inability is a hallmark of project-by-project EIS regimes (para 4.239). MICDA supports the Commonwealth taking a leading and best-practice role in addressing cumulative impacts (para 2.240) through appropriate EPBC amendments – because without this – it cannot ever properly protect MNES.

MICDA therefore supports the proposed paradigm shift from traditional EIA to a regime that considers cumulative impacts (para 4.252-254). Considering the possible options put forward in the Interim Report (para 4.255; 4.266-269; 4.270), MICDA believes that a landscape scale holistic planning approach– eg bioregional planning or strategic assessment of local planning instruments – is likely to be the most effective method of incorporating the potential for cumulative damage into EIA and decision making for proposed actions.

Chapter 10 – Strategic Assessments and Bioregional Planning

MICDA enthusiastically supports more widespread use of the landscape scale planning and assessment approaches available in the EPBC Act (para 10.2), especially where project-specific assessment is inappropriate due to scale issues. However, such an approach must be accompanied by sufficient resources to ensure rigour and high quality of outputs. MICDA also supports a general shift in focus of EPBC application and administration, towards landscape scale assessment processes. This appears to be consistent with many public submissions reported and summarised in the Interim Report (paras 10.29, 10.31-38, 10.69). MICDA also agrees that besides allowing better protection of MNES, such an approach also provides potential for administrative streamlining (see paras 10.62) and supports the concept of biocertification (see paras 10.74 and 75) to help achieve this.

In the case of Magnetic Island, we believe that two EPBC landscape approaches may be suitable – Strategic Assessment and Conservation Agreement. Bioregional Planning is less likely to be suitable without significant amendment, as there is only a small amount of Commonwealth land on Magnetic Island, and does not include the main area of concern (land outside the protected estate and subject to development pressure).

Strategic assessment of relevant State and Local government policies and plans as outlined in paras 10.4 and 5 are ideal for the Magnetic Island context, particularly the potential to deal with risks associated with cumulative impacts. As noted in para 10.7, approval or endorsement of a strategic assessment has the added potential to greatly streamline approvals of any proposed actions that are consistent with the endorsed plan, policy or program, by removing the need for each action to be approved individually. However, removal of project-by-project assessment carries dangers unless the strategic assessment and endorsement process was rigorous and performed to a high standard – which of course requires either adequate resourcing of the Department, or a system of accreditation of qualified consultants. Despite these administrative efficiencies, the biggest advantage of strategic assessment to Magnetic Island is the potential to regulate actions which contribute to cumulative impacts on MNES. However, given the reluctance of relevant state and local government agencies to voluntarily submit to EPBC principles in the past (as described earlier), we support amendment to the act to move to a non-voluntary process with Ministerial powers to request such an assessment.

Another landscape-scale alternative which may suit Magnetic Island, is the development of a conservation agreement between the Commonwealth and Townsville City Council regarding the management of MNES in areas of TCC's jurisdiction on Magnetic Island. This alternative (outlined in paras 10.24 and 25) would focus on the areas of highest risk, being those under the jurisdiction of TCC, outside the protected estate, and subject to development and urbanisation pressures. However, again, the onus should not be on the local council to voluntarily ask for such an agreement. Rather, the act should be amended to provide the Minister with the power to require such an agreement, if appropriate to protect MNES. An advantage of this approach may be a stronger emphasis and commitment to actually implement the provisions, compared to the provisions of an endorsed plan through strategic assessment. Paragraph 10.86 raises this advantage of agreements over plans. Another advantage is that it would specifically focus on the area of Magnetic Island that is most at-risk of impacts to MNES.

Whichever type of landscape scale assessment is most suitable for a particular area (such as Magnetic Island), we believe that the act should allow the Minister to require the creation of an appropriate assessment. A proposal of non-voluntary 'calling in' of plans, policies or programs for a landscape-scale assessment, was also supported by other submissions (para 10.45). Para 10.72 raises the concern that call-in powers, or the power to unilaterally require a strategic assessment, may alter the collaborative approach used in strategic assessments to date, which may then pose difficulties in compliance. However, MICDA believes that a truly collaborative approach is not a widespread reality (refer the difficulties re Magnetic Island, and also the very small number of strategic assessments that have been voluntarily instigated). MICDA supports the Commonwealth gaining the ability to act in a 'genuinely proactive way'.

MICDA supports the fundamental desired outcomes of any landscape-scale assessment – as outlined in para 10.76

- That they be rigorous, of high quality, and deliver environmental outcomes
- That they be sufficiently flexible and capable of adaptive management; and
- That they be efficient, provide certainty, and benefit proponents by reducing regulatory burden.